No. 80-1703

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In the Supreme Court of the United States

October Term, 1980

MISSISSIPPI COLLEGE,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Are the Religion Clauses of the First Amendment violated by the enforcement of Title VII of the Civil Rights Act of 1964 which allows the Equal Employment Opportunity Commission to conduct a comprehensive investigation, surveillance and reform of the employment practices of a religious educational institution, such as Mississippi College, with regard to its faculty and administration?

2. Since a significant risk of First Amendment infringement, as articulated in *N.L.R.B. v. Catholic Bishop of Chicago,* is presented here, did the Fifth Circuit err in failing to reconcile its holding with the opinion of this Court and in failing to identify an affirmative intention of Congress to cover under Title VII the employment relationship between a religious educational institution, such as Mississippi College, and its faculty and administration?

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No.

In the Supreme Court of the United States

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MISSISSIPPI COLLEGE,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Mississippi College, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 626 F.2d 477 (5th Cir. 1980) and is reprinted in Appendix A. The District Court's opinion is reported at 451 F. Supp. 564 (S.D. Miss. 1978) and is reprinted in Appendix C. The District Court's unpublished Findings of Fact and Conclusions of Law is reprinted in Appendix D.

JURISDICTION

The Court of Appeals issued its opinion (Appendix A) on September 26, 1980 and filed its judgment for record on November 20, 1980 (Appendix B). Timely petitions for rehearing filed by the appellant and the appellee were denied on November 12, 1980 (Appendix F). Justice Powell granted the petitioner's motion for an extension until April 11, 1981, in which to file this petition (Appendix G). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution and the 1964 Civil Rights Act, as amended, are set forth in Appendixes H and I respectively.

STATEMENT OF CASE

1. Proceedings before the Equal Employment Opportunity Commission

Patricia Summers filed a charge of discrimination with the Equal Employment Opportunity Commission [hereinafter referred to as the EEOC] in May, 1976, alleging that Mississippi College, the petitioner herein, had discriminated against her on the basis of her sex by denying her a full-time teaching position. She later amended her charge to add allegations that the College discriminated against women as a class in job classifications, promotions, recruitment, and pay, and that it discriminated on the basis of race in recruitment and hiring. [Opinion of Fifth Circuit at A7]. The College refused to comply with the EEOC's request for information, and a subpoena was issued seek-

ing information concerning: (1) the characteristics of each member of the College's faculty and administration, including race, sex, religion, job classification, department, date of hire, education, and pay; (2) sources from which the College recruited faculty members; (3) any studies of faculty pay for the 1975-76 year; (4) all promotions of members of the faculty or administration for 1975-76 and 1976-77 school year; (5) the employment applications for the year 1975-76 and 1976-77; and (6) the most recent EEO-6 report filed by the College. [Opinion of Fifth Circuit at A8]. In response, the College filed a petition with the EEOC to revoke the subpoena, which was denied.

2. Proceedings in the District Court

After the College declined to comply with the subpoena, an enforcement action was brought pursuant to §710 of Title VII, 42 U.S.C. §2000e-9. After a hearing the district court denied enforcement of the petition. *EEOC v. Mississippi College,* 451 F. Supp. 564 (S.D. Miss. 1978).

The district court determined, *inter alia,* that an investigation of the College's employment practices by the EEOC would result in excessive entanglement by the government in church affairs in violation of the establishment clause of the First Amendment; that such an investigation would inhibit the College in its selection of Baptist faculty members in violation of the free exercise clause of the First Amendment; and that Congress intended that the selection of faculty by such an institution as the College be exempt from Title VII. [Conclusions of Law at A44-A45].

3. Proceedings in the Court of Appeals

The Court of Appeals for the Fifth Circuit vacated the denial of enforcement and remanded the case to the district court for a determination of the question of what portions

of the EEOC's subpoena should be enforced. The basis for the court's decision was that, since the selection of co-religionists is exempt from Title VII, the threat of violation of the establishment clause is hypothetical and the burden on the College's right of fair exercise would be minimal. *Equal Employment Opportunity Commission v. Mississippi College,* 626 F.2d 477 (5th Cir. 1980).

4. Facts

Patricia Summers was hired in 1975 by Mississippi College as a part-time assistant professor in the psychology department. In 1976 she sought a full-time position in the psychology department which was awarded to a male, William Bailey. Bailey was hired over Summers because he was qualified and a Baptist, which Summers is not.

Mississippi College is owned, controlled and operated by the Mississippi Baptist Convention, which is the organization of Southern Baptist Churches in the State of Mississippi. The College is governed by a Board of Trustees elected by the Mississippi Baptist Convention. [Findings of Fact at A37; Opinion of Fifth Circuit at A1-A4].

The Convention conceives of education as an integral part of its Christian mission. It acquired the College in 1850 to further its mission to provide an education permeated by religious principles. In order to accomplish this purpose, the College chooses for its faculty and administration persons who are committed to the principle that "the best preparation for life is a program of cultural and human studies permeated by the Christian ideal, as evidenced by the tenets, practices and customs of the Mississippi Baptist Convention and in keeping with the principles and scriptures of the Bible." [Opinion of Fifth Circuit at A5; Findings of Fact at A42-43]. In accordance with this philosophy the College has a written policy of pre-

ferring Baptists. The policy was adopted by the Board of Trustees in 1923, and is set out in the faculty handbook in pertinent part as follows:

> In accordance with the purpose of the institution and its responsibility to its sponsoring denomination, the Mississippi Baptist Convention, Mississippi College seeks faculty and administrative personnel who are committed Christians and whose Christian principles are exemplified in daily living. In filling vacancies, consideration is given to members of evangelical Christian denominations, with the understanding that first preference will be given in each case to active members of Baptist Churches, provided that academic and professional standards are met.

[Opinion of Fifth Circuit at A5 n. 1]. It is evident that the policy of preferring Baptists is enforced in that 97% of the faculty are Baptists. [Findings of Fact at A43].

The intensely religious character of the College is borne out not only in its written policies but also in its academic curriculum and student activities. It is important to note that eighty-eight percent of the students are Baptists. [Findings of Fact at A42]. Religion courses are mandatory and numerous religion courses are listed in the College catalog not only in the division of religion, but throughout the various academic disciplines as well. Attendance at Chapel is required for all students twice per week, and prayer is frequently conducted in classrooms. The College provides prayer rooms for students and encourages voluntary student prayer meetings. A full-time director of Christian activities is employed and paid by the College and the Mississippi Baptist Convention. Statewide Baptist meetings are regularly held on the campus, and students participate in church activities throughout the State to carry forth the College's evangelical mission. [Findings of Fact at A41-A42].

WHY THE PETITION SHOULD BE GRANTED

This petition should be granted because the decision of the court of appeals is in substantial conflict with this Court's decisions in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and in *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

In this case, the Fifth Circuit acknowledged that "the character and purposes of the College are pervasively sectarian. . . . *Indeed the college exists primarily to serve the evangelical mission of the convention.*" [Opinion of Fifth Circuit at 11]. [Emphasis supplied]. Nevertheless, the court of appeals determined that a threatened investigation by the EEOC of the employment practices of the College with regard to its faculty and administration will not violate its rights under the religion clauses of the first amendment.

The district court found[1] that Mississippi College maintains certain personnel policies which are based on its religious convictions and upon its objective of carrying out its Christian mission. [Findings of Fact at A37, A41-A42]. One of these is a written policy of preferring Baptists over non-Baptists, which the Fifth Circuit determined was the only policy exempted from Title VII, by virtue of Section 702,[2] which the court interpreted to allow a religious em-

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1. The Fifth Circuit did not determine that any of the district court's findings of fact were clearly erroneous.

2. Section 702 of the Civil Rights Act of 1964 provides as follows:

> This Subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. §2000e-1.

ployer to prefer co-religionists in hiring. However, preference for Baptists is merely a threshold decision. It is only one of many religious-based employment policies and practices threatened by government intervention. As the district court found, the College inquires into an applicant's personal habits and characteristics to ascertain whether he complies with the moral standards demanded by the Baptist faith. The EEOC has determined that these types of policies have a disparate impact on protected classes and are illegal. *See* EEOC Compliance Manual §§135.6, 442-43. For example, as part of its inquiry, the College gives adverse consideration to such things as a person's arrest or conviction record, credit rating and failure to pay just debts. A divorced person or an unwed mother would generally not be employed. [Findings of Fact at A41]. In sum, the faculty and administration represent the basic tenets and beliefs of the Church in their personal behavior, or they are considered unfit to teach at Mississippi College, *regardless of the fact that they may nominally be Baptists.*

Thus, the petition should be granted for the following reasons: 1) The decision of the court of appeals was erroneous and in conflict with this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in that the risk of excessive government entanglement with religion in this case which would violate the establishment clause is not hypothetical; 2) The decision of the court of appeals was erroneous in that the burden on the College's right of free exercise of religion would not be minimal; and that 3) since a significant risk of First Amendment infringement, as articulated by this Court in *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), is presented by this investigation, the court of appeals erred in failing to reconcile its holding with this Court's opinion and in not articulating the affirmative intent of Congress to cover the employment relationship of the faculty and admin-

istration of a religious educational institution, such as Mississippi College.

1. The risk of excessive government entanglement with religion which would violate the establishment clause is not hypothetical.

As the district court specifically found, an EEOC investigation into the selection and assignment of its teachers would involve the government in the College's affairs by requiring production of extensive documents, records and information regarding employment practices of the school. Since many of these policies and their application were found to be rooted in religious beliefs, the EEOC would inevitably be involved in questioning and determining the sincerity and validity of the religious beliefs of the College and hence of the Mississippi Baptist Convention. [Findings of Fact at A39]. It was determined that the EEOC would substitute its guidelines for determining the comparative qualifications of teachers, in analyzing the race, sex and religion of the work force and in deciding which departments and positions are segregated unlawfully on the basis of race and sex as opposed to segregation based on religious reasons.[3] The district court also found that the EEOC would be determining the sincerity of religious belief and substituting its own judgment for that of the College and the Mississippi Baptist Convention on which religious issues are of genuine significance for employment purposes. It was further determined that the EEOC could require reformation of recruitment and hiring practices to reflect its ideas of an integrated work force,[4] desegregation of all job classifications, elimination

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3. For example, the College does not allow women to teach Bible courses. [Findings of Fact at A41].

4. For instance, the College recruits its teachers from the Association of Baptist Churches, which is predominantly white. [Opinion of Fifth Circuit at A20 n. 10].

of such employment considerations as those based on arrest and conviction records, bad credit ratings, marital status; forbid inquiry into personal habits and characteristics of applicants; require hiring and promotion quotas and extensive reporting and monitoring. [Findings of Fact at A39-A41].

Relying on these findings of fact, undisturbed by the court of appeals, and applying the rationale of this Court's decision in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), it is clear that the type of investigation, remedy and surveillance utilized and applied by the EEOC would result in no less extensive government entanglement than that described in the *Lemon* case and therein held to be violative of the establishment clause. In *Lemon v. Kurtzman,* the Court examined a state statute which paid a percentage of private school teachers' salaries as long as they taught only secular subjects, and based its decision on that statute's potential for impermissible fostering of religion. The Court concluded that a "comprehensive, discriminating and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed . . . . This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids," and that "[t]he substantial religious character of these church-related schools gives rise to the entangling church-state relationship of the kind the Religion Clauses sought to avoid." 403 U.S. 616, 619-20. The instant case cannot be distinguished from the *Lemon* case in the degree to which the government would entangle itself in the religious affairs of the College. Nor is the threat of excessive entanglement any more hypothetical in the instant case than it was in the *Lemon* case, in which the Court struck down a statute based on its *potential* for violating the establishment clause.

The question involved in this subpoena enforcement case is whether the EEOC can conduct an investigation into the employment policies of the College, found by the district court to be based on Church doctrine, without violating the First Amendment. It is clear that the EEOC would accommodate only those policies which, after investigation and examination, were determined by this governmental agency to be motivated by a justifiable religious belief. Thus, on a case-by-case basis, the EEOC would assume the role of arbiter of the religious-based beliefs and practices of the College, allowing and disallowing each in its discretion. These are determinations regarding church doctrine which the government cannot make. *Presbyterian Church v. Hull Church,* 393 U.S. 440 (1969)

2. The burden on the College's right of free exercise of religion would not be minimal.

Although the Fifth Circuit interpreted §702 of Title VII to provide an exemption to allow the College to make an employment decision in favor of a Baptist over a non-Baptist, this is insufficient to protect the College's right of free exercise of religion from government intervention. Insofar as the College's policies relating to moral and religious convictions are concerned, the EEOC may delve into these with impunity, according to the Fifth Circuit. The College would be required to go into court and defend each of its recruitment and employment policies which is based on religious considerations, which the EEOC would find offensive. This is the very situation which the First Amendment forbids, and ignores the specific holdings of this Court that: "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of prosecution, unaffected by the prospects of success or failure," *Dombrowski v. Pfister,* 380 U.S. 479 (1965), and

"[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

As the Fifth Circuit acknowledged, "except for those practices which fall outside of Title VII, the impact of Title VII on the College could be profound." [Opinion of Fifth Circuit at A26]. Since the only practice held to be exempt from Title VII is the College's preference for Baptists, it must follow that the effect of Title VII on the College's other religious-based policies is acknowledged to be profound, and that the impact on the College's free exercise rights would not be minimal as the Fifth Circuit declared. It cannot be doubted that an impending investigation by the EEOC would cause the College to attempt to minimize conflict between itself and the EEOC by modifying its employment policies to conform to those generally approved by the EEOC. "[P]rudence will ultimately dictate that the [College] tailor [its] conduct and decisions to 'steer far wider of the unlawful zone' of impermissible conduct." *Catholic Bishop of Chicago v. N.L.R.B.*, 559 F.2d 1112, 1124 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979).

Modifying the College's employment policies to comport with Title VII would mean that religious considerations could no longer be a prime area of inquiry and consideration in the College's employment policies. The result would be that applicants who do not represent the College's religious ideals would have the legal right to force the College to accept them as teachers; thus, fewer persons dedicated to the evangelical mission of the Mississippi Baptist Convention and who represents its Christian ideal would be hired.

It cannot be disputed that the College, as part of its First Amendment rights, must have freedom to choose

as its faculty and administration not only persons who are *nominally* Baptists, but persons, who in the opinion of the College, are committed to the goals and tenets of the Baptist faith. This is demanded by the Mississippi Baptist Convention, and the College's employment practices are formulated to meet that demand. If control over these policies by the Convention were lost, obviously this would destroy the College as part of the religious mission of the Mississippi Baptist Convention.

The exercise of jurisdiction by the EEOC would not constitute a minimal or speculative burden, but rather it would have a substantial, coercive effect on the free exercise rights of the College by putting it in a position of defending to a government agency and to the courts, its employment practices, which are rooted in religious belief, or of conforming them to EEOC regulations. This burden on the right of free exercise is forbidden by the First Amendment. See *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

3. A significant risk of first amendment infringement, as articulated by *N.L.R.B. v. Catholic Bishop of Chicago*, is presented by this investigation, and thus the Fifth Circuit erred in not reconciling its holding with this Court's opinion and in not identifying the "affirmative intention clearly expressed" of Congress to cover the employment relationship of the faculty and adminstration of a religious educational institution, such as Mississippi College.

The threat to the College's religious freedom presented by the EEOC investigation contemplated herein is no more hypothetical than the threat posed by the investigation of unfair labor practice charges which this Court determined presented a significant risk of First Amendment infringement in *N.L.R.B. v. Catholic Bishop of Chicago,* 440 U.S.

490 (1979). In the *Catholic Bishop* case the Court announced that the exercise of jurisdiction by the National Labor Relations Board over schools operated by the Catholic Church would raise serious constitutional questions; therefore, *"an affirmative intention clearly expressed" to bring teachers in church-operated schools within the jurisdiction of the Board had to be found.* 440 U.S. at 501, 503-07.

The Court recognized the important role of the teacher in fulfilling the religious mission of the church-operated school and noted that this was "the predicate for our conclusions that governmental aid channeled through teachers creates an impermissible risk of excessive government entanglement in the affairs of the church-operated schools." 440 U.S. at 501. On this basis, the Court concluded that the Board's exercise of jurisdiction over these schools would present a significant risk that the First Amendment would be infringed by the Board's investigation and resolution of unfair labor practice charges, which would necessarily arise.

> The resolution of such charges by the Board in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. *It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion clauses, but the very process of inquiry leading to findings and conclusions.*

440 U.S. at 502.

The enforcement of the subpoena in this case would initiate the same type of investigation with regard to the good faith of the position asserted by the College's administration and its relationship to the College's religious

mission. The threatened intrusion into the College's religious affairs is no more hypothetical at this stage than the threatened investigation in the *Catholic Bishop* case, which this Court concluded could result in infringement of the schools' First Amendment rights.

The instant case cannot be distinguished from the *Catholic Bishop* case, and the Fifth Circuit erred in not reconciling its holding with that case. Furthermore, the Fifth Circuit erred in not articulating an "affirmative intention clearly expressed" of Congress to apply Title VII to teachers and administrators in church-operated schools with a significant religious mission, such as Mississippi College. The court of appeals determined that Congress did not intend to exempt religious organizations from discriminating on any basis other than religion, in favor of co-religionists. However, the court recognized that Congress must have intended to exempt from Title VII such employment relationships as those between religious institutions and their ministers, but that the relationship at issue here was not exempt. In reaching this conclusion, the court made the superficial distinction that the College is not a Church, even though it has a significant religious mission, and its teachers are not ministers, even though they are the prime instruments for carrying out the College's religious mission. No attempt was made by the court of appeals to identify and to articulate Congress's affirmative intention clearly expressed to cover the relationship at issue here, as required by this Court in the *Catholic Bishop* case.

Section 702 provides that "[t]his title *shall not apply* . . . with respect to employment of individuals of a particular religion . . . ." This "inexact language" has been interpreted to be the result of a Congressional attempt to avoid conflicts with the religion clauses, and to exempt

the employment of persons closely allied to the religious mission of the institution, such as ministers. See *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1977). This language should also be construed to exempt from Title VII the employment of faculty and administration by an educational institution with so significant a religious mission as Mississippi College.

Thus, even assuming that Congress expressed an intent to cover religious educational institutions, the petitioner submits that the issue presented here is more narrow. That is, did Congress intend to apply Title VII to the employment of faculty and administration of a religious educational institution such as Mississippi College, which is not merely owned by a church, but which also has a significant religious mission, carried on almost exclusively by its faculty and administration. The employment of these persons is so vital to the religious mission of the College that if Congress intended that it be covered, Title VII as applied to this relationship must be determined to be unconstitutional. Nevertheless, the court of appeals failed to address itself to these points, and the petition herein should be granted in order to resolve the conflict between the reasoning and holding of this Court in *N.L.R.B. v. Catholic Bishop of Chicago* and the decision of the Fifth Circuit below.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

MISSISSIPPI COLLEGE,
Defendant-Appellee.

No. 78-3123.

United States Court of Appeals,
Fifth Circuit.
Sept. 26, 1980.
Rehearing Denied Nov. 12, 1980.

EEOC sought enforcement of a subpoena issued in connection with its investigation of a charge of discrimination filed against a college owned, controlled and operated by a religious institution. The United States District Court for the Southern District of Mississippi, William Harold Cox, J., 451 F.Supp. 564, denied enforcement, and EEOC appealed. The Court of Appeals, Charles Clark, Circuit Judge, held that: (1) white female could not charge college with discriminating against blacks without establishing that she could satisfy standing requirements of Article III to bring court action against it under Title VII; (2) Title VII had no application to employment practices of religious educational institution that discriminated on basis of religion regardless of whether religious discrimination was pretext for some other type of discrimination;

(3) relationship between religious educational institution and its faculty was not exempt from coverage of Title VII; and (4) application of Title VII to college violated neither the establishment clause nor the free exercise clause of the First Amendment.

Vacated and remanded.

1. Civil Rights (Key) 34

White female could file charge against religious educational institution alleging discrimination against blacks in violation of her own personal right to work in an environment unaffected by racial discrimination establishing that she could satisfy standing requirements of Article III to bring court action against college under Title VII. Civil Rights Act of 1964, § 706 as amended 42 U.S.C.A. § 2000e-5; U.S.C.A.Const. Art. 3, § 1 et seq.

2. Civil Rights (Key) 34

Although white female's amended charge of racial discrimination filed against religious educational institution failed to disclose specific injury that she suffered because of college's racially discriminatory practices, amended charge sufficiently stated charge of racial discrimination by claiming that discrimination deprived white female of benefits arising from association with racial minorities in working environment unaffected by discrimination. Civil Rights Act of 1964, § 706 as amended 42 U.S.C.A. § 2000e-5.

3. Civil Rights (Key) 35

If a religious institution presents convincing evidence that a challenged employment practice resulted from discrimination on basis of religion, EEOC is deprived of jurisdiction to investigate further to determine whether religious discrimination was pretext for some other form of dis-

crimination. Civil Rights Act of 1964, § 702 as amended 42 U.S.C.A. § 2000e-1.

4. Civil Rights (Key) 9.10

Only the relationship between a church and its minister is exempt from coverage of Title VII; relationship between a religious educational institution and its faculty is not exempt from such coverage. Civil Rights Act of 1964, § 702 as amended 42 U.S.C.A. § 2000e-1.

5. Civil Rights (Key) 2.1

Constitutional Law (Key) 84

Imposing the requirements of Title VII upon a college owned, controlled and operated by a religious institution does not violate the establishment clause of the First Amendment. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; U.S.C.A.Const. Amend. 1

6. Civil Rights (Key) 2.1

Constitutional Law (Key) 84

Application of Title VII to educational institutions which are owned, controlled and operated by religious institutions does not violate the free exercise clause of the First Amendment. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; U.S.C.A. Const. Amend. 1.

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James T. McCafferty, III, Charles R. Davis, Jackson, Miss., amicus curiae for Miss. Baptist Convention Board.

Bruce R. Hopkins, Washington, D. C., amicus curiae for Christian College Coalition.

Peyton S. Irby, Jr., Jackson, Miss., amicus curiae for William Carey Col. & Am. Assoc. of Presidents of Independent Colleges and Universities.

Walter E. Carson, Washington, D. C., amicus curiae for Seventh-day Adventist Church.

Appeal from the United States District Court for the Southern District of Mississippi.

Before MORGAN, CHARLES CLARK, and TATE, Circuit Judges.

CHARLES CLARK, Circuit Judge:

The Equal Employment Opportunity Commission [EEOC] appeals the district court's denial of its petition seeking enforcement of a subpoena issued in connection with its investigation of a charge of discrimination filed against Mississippi College [College]. At issue is a significant interplay between the effective enforcement of Title VII and the religious protections of the first amendment. We vacate the judgment appealed from and remand the action to the district court.

I. FACTS

A. The College

Mississippi College is a four-year coeducational liberal arts institution located in Clinton, Mississippi. The College is owned and operated by the Mississippi Baptist Convention [Convention], an organization composed of Southern Baptist churches in Mississippi.

The Convention conceives of education as an integral part of its Christian mission. It acquired the College in 1850 and has operated it to the present day to fulfill that mission by providing educational enrichment in a Christian atmosphere. As part of its policy, Mississippi College seeks to assure that faculty and administrative officers are committed to the principle that "the best preparation for life is a program of cultural and human studies permeated by the Christian ideal, as evidenced by the tenets, practices and customs of the Mississippi Baptist Convention and in keeping with the principles and scriptures of the Bible." In accordance with this purpose, the College has a written policy of preferring active members of Baptist churches in hiring.[1] The evidence the College presented to the dis-

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1. The "Handbook for Members of the Faculty and Staff" prepared by the College, which purports to outline some of its policies and procedures, provides:

> In accordance with the purpose of the institution and its responsibility to its sponsoring denomination, the Mississippi Baptist Convention, Mississippi College seeks faculty and administrative personnel who are committed Christians and whose Christian principles are exemplified in daily living. In filling vacancies, consideration is given to members of evangelical Christian denominations, with the understanding that first preference will be given in each case to active members of Baptist churches, provided that academic and professional standards are met.
>
> Each vacancy and each applicant will be evaluated individually; in this way, Mississippi College through the years has been able to secure the services of some outstanding

(Continued on following page)

trict court indicates that approximately ninety-five percent of the college's full-time faculty members are Baptists. The evidence also shows that eighty-eight percent of the College's students are Baptists. The undergraduate curriculum for all students, regardless of major, includes two courses in which the Bible is studied, and all students are required to attend chapel meetings held twice weekly. The College's facilities include prayer rooms available for use by the students and the College employs a full-time director of Christian activities. Because no woman has been ordained as a minister in a Southern Baptist church in Mississippi, the College hires only males to teach courses concerning the Bible.

B. The Charging Party

Dr. Patricia Summmers, the charging party, obtained part-time employment with the College as an assistant professor in the psychology department for the 1975-76 school year. While employed by the College, Summers learned of a vacancy in the full-time faculty of the department of educational psychology created by the departure of Raymond Case, an experimental psychologist. She expressed her desire both orally and in writing to be con-

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Footnote continued—

Christians of other denominations who have been exemplary in their devotion to the ideals of the College. However, the selection of non-Baptists to fill certain specific positions when no equally qualified Baptist is available does not indicate a departure from the continuing purpose of the institution to seek first for committed Baptists and, when appropriately qualified Baptists are not available, to accept committed evangelical Christians whose beliefs and practices are compatible with those of the College's parent denomination.

The Baptist preference policy was originally adopted by the Board of Trustees in 1923, who by unanimous vote enacted a policy "of selecting as teachers in the college members of the Baptist Church, except in such cases where educational standards could not be maintained."

sidered for the position, but she was not interviewed by College officials. Instead, the College hired William Bailey to fill the vacant position. When Summers inquired why she had not been considered for the vacancy, the Vice President of Academic Affairs informed her that the College sought someone with a background in experimental psychology.

In May 1976, Summers filed a charge of discrimination with the EEOC, alleging that Mississippi College had discriminated against her on the basis of sex in hiring someone to fill the vacant full-time position in the psychology department. She later amended her charge to include the additional allegations that the College discriminated against women as a class with respect to job classifications, promotions, recruitment, and pay and that it discriminated on the basis of race in recruiting and hiring.[2]

The evidence before the district court demonstrates that Summers had received a doctoral degree in education from the University of Virginia with a major in counseling and had engaged in post-doctoral studies at Harvard University and other nationally recognized schools. In an affidavit filed with the court, Summers averred that she previously had taught experimental psychology. The President of Mississippi College, Dr. Lewis Nobles, stated both in an affidavit filed with the EEOC and in his testimony before the district court that the College sought to fill the vecancy with an experimental psychologist, that

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2. In her amended charge, Summers complained of the following actions by the College:

> The above named employer has unlawfully discriminated against me by denying me a full-time position because of my sex (female). The above named employer also discriminates against females as a class with respect to segregated job classifications, failure to promote, failure to recruit, and pay. Further, the above named employer has discriminated on the basis of race by failing to recruit and hire Black faculty members.

Bailey had been trained in this field, and that Summers' experience was in clinical psychology. Nobles also stated that an additional factor in the College's selection of Bailey was that he was a Baptist, while Summers was not. Although Summers had been baptized in the Baptist faith while a child, she joined the Presbyterian church, the faith of her husband, when she married in 1970.

Although the College did not hire Summers to fill the vacant full-time position, it did offer to renew her part-time contract for the 1976-77 school year at an increased salary. In offering to renew her contract the College did not indicate that it had any objections to her religious views.

C. The Subpoena Enforcement Proceedings

The College refused to comply voluntarily with the EEOC's request for information that the Commission considered necessary to investigate Summers' charge. The EEOC issued a "SUBPOENA AD TESTIFICANDUM/ DUCES TECUM," seeking information concerning: (1) the characteristics of each member of the College's faculty and administration, including race, sex, religion, job classification, and pay; (2) sources from which the College recruited faculty members; (3) any studies of faculty pay for the 1975-76 year; (4) all promotions of members of the faculty or administration for the 1975-76 and 1976-77 school years; (5) the employment records of Summers and Bailey; (6) all employment applications for the years 1975-76 and 1976-77; and (7) the most recent EEO-6 report filed by the College.[3] The College responded to the sub-

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3. Specifically, the subpoena directed Dr. Nobles to appear before the district counsel for the EEOC and to produce the documents described as follows:

1. A list of all staff (faculty and administration) showing for each person:

(Continued on following page)

poena by filing a petition with the EEOC seeking revocation of the subpoena. The EEOC denied the College's petition. The College still declined to comply with the subpoena and the EEOC brought this action in the district court seeking enforcement of the subpoena under § 710 of Title VII, 42 U.S.C. § 2000e-9.[4] After a hearing on the

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Footnote continued—

A. Name
B. Race
C. Sex
D. Religion
E. Job classification
F. Department
G. Pay
H. Date of hire
I. Date of entry into present position
J. Highest degree attained

2. A list of all sources from which faculty members have been recruited for the 1975-76 and 1976-77 academic years.

3. A copy of any studies conducted by Respondent of its patterns of faculty pay for the 1976-76 academic year.

4. A list of all faculty and administrative promotions for the 1975-76 and 1976-77 academic years giving the name, sex, job left, job entered, and a date of charge for each person promoted during that period.

5. Copies of the employment records of Patricia Summers and William Bailey.

6. Access to all applications for employment in faculty and administrative positions for the 1975-76 and 1976-77 academic years.

7. A copy of the most recent EEO-6 report filed by Respondent.

4. Section 710 of Title VII grants to the EEOC, for the purposes of any hearing or investigation it conducts, the same investigatory powers exercised by the National Labor Relations Board under 29 U.S.C. § 161. Thus § 710 empowers the district court within whose jurisdiction either the EEOC is conducting its inquiry or the person resides against whom enforcement of the subpoena is sought to order any person who refuses to obey a subpoena issued by the EEOC to appear before the EEOC, to produce evidence if so ordered, or to give testimony concerning the matter under investigation. Any failure to obey is punishable as a contempt of court. *See* 29 U.S.C. § 161.

merits, the district court denied enforcement of the petition. *EEOC v. Mississippi College,* 451 F.Supp. 564 (S.D. Miss.1978).

The district court found that the College was a religious educational institution, that by written policy the College accorded a preference in hiring to Baptists except where necessary to maintain academic standards that Summers was Presbyterian, and that the male whom the College hired for the position sought by the charging party was Baptist. After stating that the EEOC's investigation of Summers' charge did not involve any question of race discrimination, the district court concluded (1) that under § 702 of Title VII[5] the EEOC could not investigate Summers' claim of employment discrimination except to determine whether the College's allegation that it hired Bailey because of his religion was true; (2) that because an investigation of the College's employment practices by the EEOC would result in excessive entanglement of the government in church affairs, the application of Title VII to a religious educational institution violated the establishment clause of the first amendment; (3) that because an investigation of the College's employment practices by the EEOC potentially would inhibit the College's practice of preferring Baptists in hiring, the EEOC's exercise of jurisdiction over the College violated the free exercise clause of the first amendment; and (4) that the College's selection of faculty members involved matters of church administration, that are exempt from the application of Title

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5. Section 702 of Title VII, 42 U.S.C. § 2000e-1, reads:

> This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

VII under this court's decision in *McClure v. Salvation Army,* 460 F.2d 553 (5th Cir.), *cert. denied,* 409 U.S. 896, 93 S.Ct. 132, 34 L.Ed.2d 153 (1972).

On this appeal the EEOC contends that the district court erred in denying its petition for enforcement. First, it asserts that Summers, although white, can assert a charge of race discrimination against the College because she has standing to assert discrimination that affects her "working environment." Second, it argues that § 702 does not exempt race or sex discrimination by a religious education institution from the scope of Title VII. Third, it maintains that its investigation of the College's hiring practices violates neither the establishment clause nor the free exercise clause of the first amendment.

II. SUMMERS' STANDING TO ASSERT A CHARGE OF RACIAL DISCRIMINATION

The district court concluded that the EEOC's subpoena enforcement action did not involve any question of racial discrimination by the College. *EEOC v. Mississippi College,* 451 F.Supp. at 565. The EEOC argues that this conclusion was erroneous because Summers included in her amended charge allegations that the College discriminated against blacks in the recruitment and hiring of faculty members. The EEOC asserts that Summers, a white female, has standing to charge the College with discrimination against others that affected her "working environment."

A. Can a Person Charge Discrimination Against a Group of Which he is not a Member?

Section 703 of Title VII proscribes those employment practices utilized by an employer that discriminate against

any individual "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. Section 706(b) of Title VII permits "a person claiming to be aggrieved, or . . . a member of the Commission" to file with the EEOC a charge alleging an unlawful employment practice under Title VII. *See id.* § 2000e-5(b).

In *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972), Judge Goldberg, without the concurrence of either of the two other panel members, concluded that an employee could charge her employer under § 703 with discrimination that, although not directed towards her, had the effect of creating a "working environment heavily charged with discrimination."[6] Judge Goldberg observed that § 703(a)(1) of Title VII prohibits discrimination with respect with "compensation, terms, conditions or privileges of employment" and reasoned that Congress intended to encompass within Title VII subtle discriminatory practices that, while not directed toward the charging employee, affected the employee by creating a working environment "polluted" with discrimination. *Id.* at 237-39.

The College relies on *Stroud v. Delta Air Lines, Inc.*, 544 F.2d 892 (5th Cir.), *cert. denied*, 434 U.S. 844, 98 S.Ct. 146, 54 L.Ed.2d 110 (1977). In *Stroud*, a panel of this court, after noting in dictum that Delta Air Lines' policy of hiring only female flight attendants violated § 703, stated that the "plaintiff [a female former stewardess] is not a person who may assert the rights of prospective male flight attendants who would complain of this illegality." *Id.* at 893. We interpret *Stroud* to hold that a Title VII plaintiff may assert only his own right to be free from discrimination that has an effect

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6. Judge Godbold concurred on a different ground. Judge Roney dissented.

upon him and may not assert the rights of others to be free from discrimination.

Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972), will not permit the language in *Stroud* to bar every charge of discriminatory employment practices directed against a group of which the charging party is not a member. In *Trafficante,* the Supreme Court construed the meaning of the term "person aggrieved" contained in § 810(a) of the Fair Housing Act, 42 U.S.C. § 3610(a). The Court reasoned that by defining "aggrieved person" in § 810(a) to include "[a]ny person who claims to have been injured by a discriminatory housing practice," Congress demonstrated an intent to confer standing to the fullest extent permitted by Article III of the United States Constitution. Because the black and white tenants of an apartment complex alleged to have discriminated against nonwhites met the requirement of *Sierra Club v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), by alleging injury in fact in the form of "the loss of important benefits from interracial associations," the Court found that they had standing to challenge the alleged discrimination against nonwhites by filing complaints under § 810 of the Fair Housing Act. 409 U.S. at 210, 93 S.Ct. at 367, 34 L.Ed.2d at 415.

We agree with other circuits that have held that the strong similarities between the language, design, and purposes of Title VII and the Fair Housing Act require that the phrase "a person claiming to be aggrieved" in § 706 of Title VII must be construed in the same manner that *Trafficante* construed the term "aggrieved person" in § 810 of the Fair Housing Act. *See, EEOC v. Bailey Co.*, 563 F.2d 439, 450-54 (6th Cir. 1977), *cert. denied,* 435 U.S. 915, 98 S.Ct. 1468, 55 L.Ed.2d 506 (1978); *Waters v.*

Heublein, 547 F.2d 466, 469-70 (9th Cir. 1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1100 (1977).[7]

[1] We conclude that § 706 of Title VII permits Summers to file a charge asserting that Mississippi College discriminates against blacks on the basis of race in recruitment and hiring.[8] Our decision today does not allow Summers to assert the rights of others. We hold no more than that, provided she meets the standing requirements imposed by Article III, Summers may charge a violation of her own personal right to work in an environment unaffected by racial discrimination.

B. Sufficiency of Summers' Charge

Two problems inhere in Summers' attempt to charge racial discrimination by the College. First, her charge does not identify how she has been injured by the alleged racial discrimination. Second, her charge of racial discrimination may not have been timely filed.

[2] In her amended charge, Summers asserted that the College "has discriminated on the basis of race by failing to recruit and hire Black faculty members." As

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7. In making its determination under the Fair Housing Act, the Supreme Court in *Trafficante* explicitly relied upon the construction by the Third Circuit of similar language embodied in § 706 of Title VII, 42 U.S.C. § 2000e-5, in *Hackett v. McGuire Brothers*, 445 F.2d 442 (3d Cir. 1971). In *Hackett* the Third Circuit held that the words "by a person claiming to be aggrieved" contained in § 706 showed "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Id.* at 446.

8. We decide only the issue before us of whether a white employee can charge her employer with discriminating against blacks in violation of Title VII. We expressly pretermit the question of whether any form of discrimination other than racial discrimination can be charged by a person who is not a member of the group against whom the discrimination is directed. *See EEOC v. Bailey Co.*, 563 F.2d at 454 n.9. We likewise pretermit and intimate no opinion concerning Summers' adequacy as a class representative for any blacks against whom the College may have discriminated.

a general rule, charges filed with the EEOC must be liberally construed because charging parties usually are unfamiliar with the technicalities of formal pleadings and are not assisted by an attorney. *See Tillman v. City of Boaz,* 548 F.2d 592, 596 (5th Cir. 1977); *Sanchez v. Standard Brands, Inc.,* 431 F.2d 455, 462-63 (5th Cir. 1970). Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), requires that charges be filed in writing under oath and that they "contain such information and be in such form as the Commission requires." The EEOC's regulations establish very minimal requirements for the sufficiency of charges and allow technical defects or omissions to be cured by amendment:

> a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. . . .

29 C.F.R. § 1601.12(b) (1979). We conclude that, by identifying in a general fashion the parties involved and the action or practices complained of, Summers' amended charge sufficiently stated a charge of racial discrimination. Although Summers' amended charge fails to disclose the specific injury that she suffered because of the College's alleged racially discriminatory practices, we accept the argument of the EEOC that Summers could claim that the discrimination deprived her of the benefits arising

from association with racial minorities in a working environment unaffected by discrimination.

The record before us on this appeal prevents us from determining whether Summers' charge of racial discrimination was timely. Summers' original charge filed with the EEOC alleged only that the College had discriminated against her on the basis of her sex in denying her a full-time faculty position. The issue of racial discrimination did not arise until Summers filed the amended charge on November 30, 1976. Because her allegations of racial discrimination do not relate to or grow out of the allegations of sex discrimination advanced in the original charge, that aspect of the amended charge does not relate back to the time of filing of her original charge. The charge of racial discrimination is therefore time barred unless it could have been timely filed on November 30, 1976, as a separate charge.

While the record does not establish the date on which her employment with the College terminated, it suggests that she left the College's employ following the 1975-76 school year. Thus the charge of racial discrimination by the College may be barred, if it was not filed within 180 days of the termination of her employment with the College. *See* 42 U.S.C. § 2000e-5(e).[9]

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9. 42 U.S.C. § 2000e-5(e) reads:

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days

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Summers' amended charge characterizes the discrimination as "continuing." However, under the construction of her charge of racial discrimination urged by the EEOC and adopted by us on appeal, the unlawful practice ceased with respect to Summers once she left the working environment. *See United Air Lines, Inc. v. Evans,* 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977). We leave the determination of the timeliness of her charge of racial discrimination to be determined by the district court on remand.

III. SECTION 702 OF TITLE VII

Section 702 of Title VII exempts from the application of Title VII religious educational institutions "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such . . . educational institution . . . of its activities." 42 U.S.C. § 2000e-1.

The EEOC contends that § 702 only exempts from the coverage of Title VII discrimination based upon religion, not discrimination predicated upon race, color, sex, or national origin. It argues that the College's mere assertion that it declined to hire Summers because of her religion should not prevent it from investigating to determine if the College used Summers' religion as a pretext for some other form of discrimination. The College asserts that its hiring decision falls squarely within the statutory exemption created by § 702.

Footnote continued—

after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

This court previously rejected the argument that the exemption provided by § 702 applies to all of the actions of a religious organization taken with respect to an employee whose work was connected with its "religious activities." *See McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896, 93 S.Ct. 132, 34 L.Ed.2d 153 (1972). In *McClure* we restricted the application of that exemption to a religious organization's discrimination in employment against an individual on the basis of religion, stating:

> The language and the legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.

Id. at 558.

[3] The College argues first that once it showed (1) an established policy of preferring Baptists in its hiring decisions, (2) that the individual hired for the position was Baptist, and (3) that the charging party was not a Baptist, § 702 prevented the EEOC from investigating further the charge of discrimination. *McClure* did not address the EEOC's authority to investigate an individual charge of race or sex discrimination asserted against a religious institution that presents evidence showing that it made the challenged employment decision on the basis of an individual's religion. We conclude that if a religious institution of the kind described in § 702 presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, § 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a

pretext for some other form of discrimination. This interpretation of § 702 is required to avoid the conflicts that would result between the rights guaranteed by the religion clauses of the first amendment and the EEOC's exercise of jurisdiction over religious educational institutions. *See N.L.R.B. v. Catholic Bishop of Chicago,* 440 U.S. 490, 500-02, 99 S.Ct. 1313, 1319-20, 59 L.Ed.2d 533, 541-42 (1979); *McClure v. Salvation Army,* 460 F.2d at 558-60.

The College argues second, and more broadly, that the employment relationship between a religious educational institution and its faculty is exempt from Title VII. It relies on *McClure's* holding that the relationship between a church and its ministers was not intended by Congress to be covered by Title VII. The College's reliance on *McClure* as support for this argument is misplaced.

[4] In *McClure* this court expressly restricted its decision to the context of the church-minister relationship. Id. at 555. We concluded that matters touching the relationship between a church and its ministers, including the selection of a minister, determination of salary, and assignment of duties and location, are "matters of church administration and government and thus, purely of ecclesiastical cognizance." *Id.* at 559-60. The facts distinguish this case from *McClure.* The College is not a church. The College's faculty and staff do not function as ministers. The faculty members are not intermediaries between a church and its congregation. They neither attend to the religious needs of the faithful nor instruct students in the whole of religious doctrine. That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment matters of church administration and thus purely of ecclesiastical concern. The employment relationship between Mississippi College and its faculty and

staff is one intended by Congress to be regulated by Title VII.

Because the College is not a church and its faculty members are not ministers, *McClure's* construction of Title VII does not bar the EEOC in the instant case from investigating Summers' allegations that the college engages in class discrimination against women and blacks.[10] However, as pointed out above, § 702 may bar investigation of her individual claim. The district court did not make clear whether the individual employment decision complained of by Summers was based on the applicant's religion.[11] Thus, we cannot determine whether the ex-

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10. The College has asserted both before this court and before the district court that its desire to employ Southern Baptists whenever possible to facilitate the carrying out of its religious mission has resulted in its adoption of several recruiting and employment practices that tend to have a disparate impact upon women and blacks. The College contends, for example, that it recruits faculty members through the Association of Baptist Colleges, the member colleges of which have predominantly white student bodies. To the extent that this employment practice is based upon religious discrimination, § 702 exempts it from the application of Title VII. However, any choice by the College to recruit only among Baptist colleges that are predominantly white as opposed to all Baptist colleges is not protected by § 702 and could be investigated by the EEOC. Also, § 702 does not prevent the EEOC from investigating whether the College discriminates against any blacks who may apply from the schools at which it does recruit. The determination of which of the College's employment practices are based upon religious discrimination and therefore exempt under § 702 can best be made by the district court on remand. On remand the College should be granted a further opportunity to present evidence demonstrating which parts of the information sought concern practices based upon religious discrimination.

11. In its original opinion, the district court stated:

> the petitioner [EEOC] has asserted that the respondent [Mississippi College] failed to hire Dr. Summers *solely because of the fact that she is a female. That contention is not denied,* but the college contends that it is a privately owned and operated religious institution and that its decision may not be inquired into or changed by any disagreement with such conclusions; and least of all that the petitioner simply has no statutory authority to issue a subpoena and to require conformity thereto under any guise or pretext.

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emption of § 702 applies. If the district court determines on remand that the College applied its policy of preferring Baptists over non-Baptists in granting the faculty position to Bailey rather than Summers, then § 702 exempts that decision from the application of Title VII and would preclude any investigation by the EEOC to determine whether the College used the preference policy as a guise to hide some other form of discrimination. On the other hand, should the evidence disclose only that the College's preference policy could have been applied, but in fact it was not considered by the College in determining which applicant to hire, § 702 does not bar the EEOC's investigation of Summers' individual sex discrimination claim.

IV. FIRST AMENDMENT QUESTIONS

The EEOC contends that the district court erred in concluding that application of Title VII to a religious educational institution would foster the excessive government entanglement with religion prohibited by the establishment clause and would impermissibly burden the institution's practice of its religious beliefs in violation of the free exercise clause.

Footnote continued—

EEOC v. Mississippi College, 451 F.Supp. at 565 (emphasis added). In the "Findings of Fact and Conclusions of Law" that the district court issued subsequent to its opinion, it found:

> Mississippi College has a written policy of preferring applicants of the Baptist Faith except when it becomes necessary in a particular instance to hire a non-Baptist in order to maintain academic standards in a given discipline. It is undisputed that the male who was hired for the position in question is a Baptist while the charging party is Presbyterian.

This finding does not explicitly conclude that the College applied its Baptist preference policy in determining not to hire Summers, even though it indicates that the decision could have been based at least in part on Summers' religion.

A. Establishment Clause

The establishment clause of the first amendment prohibits Congress from enacting any law "respecting an establishment of religion." U.S.Const. Amend. I. In determining whether a congressional enactment violates the establishment clause, the Supreme Court has examined three principal criteria: (1) whether the statute has a secular legislative purpose, (2) whether the principal or primary effect of the statute is neither to advance nor to inhibit religion, and (3) whether the statute fosters "an excessive government entanglement with religion." *Lemon v. Kurtzman,* 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745, 752 (1971). *See also Committee for Public Education and Religious Liberty v. Regan,* 444 U.S. 646, 654, 100 S.Ct. 840, 846, 63 L.Ed.2d 94, 102 (1980); *Roemer v. Maryland Public Works Bd.,* 426 U.S. 736, 748, 96 S.Ct. 2337, 2348, 49 L.Ed.2d 179, 188 (1976). The College does not contend that Title VII has no secular legislative purpose or that it inhibits or advances religion as its primary effect. We therefore focus our inquiry upon the third criteria: whether the statute fosters an excessive entanglement with religion.

In *Lemon* the Court evaluated three factors in determining whether government entanglement with religion is excessive:

> the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.

403 U.S. at 614-15, 91 S.Ct. at 2112, 29 L.Ed.2d at 756. *See also Roemer v. Board of Public Works of Maryland,* 426 U.S. at 761-765, 96 S.Ct. at 2352-53, 49 L.Ed.2d at 196-198 (1976). Although the Supreme Court generally has construed the establishment clause in the context of governmental action that benefited a religious activity,

see *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980); *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), it is now clear that the establishment clause is implicated by a statute that potentially burdens religious activities. *See N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-502, 99 S.Ct. 1313, 1319-20, 59 L.Ed.2d 533, 541-542 (1979). The three-prong test employed in *Lemon* to determine whether government entanglement is excessive applies with equal force to such cases.

The evidence presented to the district court makes it readily apparent that the character and purposes of the College are pervasively sectarian. The purpose of the College is to provide a college education in an atmosphere saturated with Christian ideals. The College is formally affiliated with the Mississippi Baptist Convention. Indeed, the College exists primarily to serve the evangelical mission of the Convention. The Convention selects the Board of Trustees that exercises effective control over the College.

The nature of the burden that might be imposed upon the College by the application of Title VII to it is largely hypothetical at this stage of the proceedings. The information requested by the EEOC's subpoena does not clearly implicate any religious practices of the College. The College's primary concern is that the EEOC's investigation will not cease should it comply with the subpoena, but instead will intrude further into its operations. The College worries that the EEOC will seek to require it to alter the employment practices by which it seeks to ensure that its faculty members are suitable examples of the Christian ideal advocated by the Southern Baptist faith. These hypothetical concerns are of limited validity. As noted previously, the exemption granted to religious institutions by § 702 of Title VII must be construed broadly to exclude from the scope of the act any employment

decision made by a religious institution on the basis of religious discrimination. This construction of § 702 largely allays the College's primary concern that it will be unable to continue its policy of preferring Baptists in hiring. The only practice brought to the attention of the district court that is clearly predicated upon religious beliefs that might not be protected by the exemption of § 702 is the College's policy of hiring only men to teach courses in religion.[12] The bare potential that Title VII would affect this practice does not warrant precluding the application of Title VII to the College. Before the EEOC could require the College to alter that practice, the College would have an opportunity to litigate in a federal forum whether § 702 exempts or the first amendment protects that particular practice. We thus determine that, in the factual context before us, the application of Title VII, to the College could have only a minimal impact upon the College's religion based practices.

The relationship between the federal government and the College that results from the application of Title VII does have limits both in scope and effect. It is true that the subpoena issued to the College by the EEOC presages a wide ranging investigation into many aspects of the College's hiring practices. Furthermore, should the EEOC conclude that cause exists to believe that the College discriminates on the basis of sex or race, the College in all likelihood would be subjected to a court action if it did not voluntarily agree to alter its actions. The College would, however, be entitled to a de novo determination of whether its practices violate Title VII. In that action the College could reassert the protection of the first amend-

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12. In his testimony before the district court Dr. Nobles explained that the practice of not hiring women to teach religion courses was based upon Bible scriptures indicating that pastors and deacons should be men. He testified that to his knowledge no member church of the Mississippi Baptist Convention had an ordained woman preacher.

ment prior to being ordered to amend its practices. If the challenged employment practices survived the scrutiny of the district court, the EEOC could not attack again those particular practices absent some change in circumstances.

[5] Although the College is a pervasively sectarian institution, the minimal burden imposed upon its religious practices by the application of Title VII and the limited nature of the resulting relationship between the federal government and the College cause us to find that application of the statute would not foster excessive government entanglement with religion. Employment practices based upon religious discrimination are exempt under § 702 from the coverage of Title VII and the College could not be required to alter any of its other employment practices until it exercised its opportunity to justify those practices on first amendment grounds before a federal district court. Because no religious tenets advocated by the College or the Mississippi Baptist Convention involve discrimination on the basis of race or sex, an investigation by the EEOC will only minimally intrude upon any of the College's or Convention's religious beliefs. No ongoing interference with the College's religious practices will result from an EEOC investigation of the charge filed by Summers. Therefore, we conclude that imposing the requirements of Title VII upon the College does not violate the establishment clause of the first amendment.

B. The Free Exercise Clause

The free exercise clause of the first amendment proscribes any congressional legislation "prohibiting the free exercise" of religion. U.S.Const. Amend. I.

In determining whether a statutory enactment violates the free exercise of a sincerely held religious belief, the Supreme Court has examined (1) the magnitude of the statute's impact upon the exercise of the religious belief,

(2) the existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief, and (3) the extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state. *See Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).

As discussed previously, the impact of Title VII upon the exercise of the religious belief is limited in scope and degree. Section 702 excludes from the scope of Title VII those employment practices of the College that discriminate on the basis of religion. We acknowledge that, except for those practices that fall outside of Title VII, the impact of Title VII on the College could be profound. To the extent that the College's practices foster sexual or racial discrimination, the EEOC, if unable to persuade the College to alter them voluntarily, could seek a court order compelling their modification, imposing injunctive restraints upon the College's freedom to make employment decisions, and awarding monetary relief to those persons aggrieved by the prohibited acts. However, the relevant inquiry is not the impact of the statute upon the institution, but the impact of the statute upon the institution's exercise of its sincerely held religious beliefs. The fact that those of the College's employment practices subject to Title VII do not embody religious beliefs or practices[13] protects the College from any real threat of undermining its religious purpose of fulfilling the evangelical role of the Mississippi Baptist Convention, and allows us to conclude that the impact of Title VII on the free exercise of religious beliefs is minimal.

Second, the government has a compelling interest in eradicating discrimination in all forms. *See Brown v.*

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13. *See* text at note 12, *supra.*

Dade Christian Schools, Inc., 556 F.2d 310, 323 (5th Cir. 1977) (en banc) (Goldberg, J., specially concurring), *cert. denied*, 434 U.S. 1063, 98 S.Ct. 1235, 55 L.Ed.2d 763 (1978). Congress manifested that interest in the enactment of Title VII and the other sections of the Civil Rights Act of 1964. The proscription upon racial discrimination in particular is mandated not only by congressional enactments but also by the thirteenth amendment. We conclude that the government's compelling interest in eradicating discrimination is sufficient to justify the minimal burden imposed upon the College's free exercise of religious beliefs that results from the application of Title VII.

[6] Moreover, we conclude that creating an exemption from the statutory enactment greater than that provided by § 702 would seriously undermine the means chosen by Congress to combat discrimination and is not constitutionally required. Although the number of religious educational institutions is minute in comparison to the number of employers subject to Title VII, their effect upon society at large is great because of the role they play in educating society's young. If the environment in which such institutions seek to achieve their religious and educational goals reflects unlawful discrimination, those discriminatory attitudes will be perpetuated with an influential segment of society, the detrimental effect of which cannot be estimated. Because the burden placed upon the free exercise of religion by the application of Title VII to religious educational institutions is slight, because society's interest in eradicating discrimination is compelling, and because the creation of an exemption greater than that provided by § 702 would seriously undermine Congress' attempts to eliminate discrimination, we conclude the application of Title VII to educational institutions such as Mississippi College does not violate the free exercise clause of the first amendment.

V. CONCLUSION

To summarize our holdings, we conclude that (1) Summers cannot charge the College with discriminating against blacks without establishing that she could satisfy the standing requirements of Article III of the Constitution to bring a court action against it under Title VII; (2) section 702 of Title VII, excludes from the application of the Act any employment practices of a religious educational institution that discriminate on the basis of religion regardless of whether the religious discrimination is a pretext for some other type of discrimination; (3) *McClure v. Salvation Army,* exempts from the coverage of Title VII only the relationship between a church and its minister and does not apply to the relationship between a religious educational institution and its faculty; and (4) the application of Title VII to the College violates neither the establishment clause nor the free exercise clause of the first amendment. We vacate the district court's findings of fact, its conclusions of law, and its initial opinion and remand for further proceedings consistent with this opinion. We specifically note that on remand the district court should determine whether Summers' charge of race discrimination was timely filed and should allow the parties to present further evidence demonstrating which employment practices of Mississippi College are exempt from the coverage of Title VII under § 702 as construed by this opinion. We leave for resolution by the district court on remand the question of what portions of the EEOC's subpoena should be enforced.[14]

VACATED and REMANDED.

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14. We note that EEOC's request for a copy of the most recent EEO-6 report filed by the College should be denied since that report is already in its possession, see *EEOC v. Packard Electric Division, General Motors Corp.*, 569 F.2d 315, 318-19 (5th Cir. 1978).

APPENDIX B

(Filed November 24, 1980)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3123

D. C. Docket No. CA-J78-0113(C)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

versus

MISSISSIPPI COLLEGE,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi
Before MORGAN, CHARLES CLARK and TATE,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

September 26, 1980

ISSUED AS MANDATE: November 20, 1980

APPENDIX C

(Filed May 5, 1978)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J78-0113(C)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

MISSISSIPPI COLLEGE,
Respondent.

This case involves a controversy within the Equal Employment Opportunity provisions of the Civil Rights Act. The charging party is Dr. Patricia A. Sumners who contends that she was not employed by the college in the Psychology Department of the college because she is a female. There is nothing before the Court in anywise involving any race question. The charging party and her husband have been employed as Professors at Mississippi College. Dr. Sumners was baptized in the Baptist Church at Iuka, Mississippi when she was about ten years old and has remained in the church until around 1970 when she

joined the Presbyterian Church to be with her husband in her church affiliation. She sought full time employment when there was an opening but that job was awarded to a male professor of the Baptist faith.

Mississippi College is owned, controlled and operated by the Mississippi Baptist Convention as a part of its Christian Mission Program. This proceeding is basically and essentially to enforce a subpoena Duces Tecum Ad Testificandum. The petitioner contends and insists that it is simply investigating the facts to see whether or not the respondent is actually covered by the act or not. The Congress has no power, no authority to make any law in anywise affecting the establishment of religion or prohibiting the free exercise thereof.[1]

With such restriction, the Congress enacted and the President signed into law the section of the Code which makes it clear that the Chapter has no application to a female in the employ of Mississippi College.[2]

Under such circumstances, the petitioner has asserted that the respondent failed to hire Dr. Sumners solely because of the fact that she is a female. That contention is not denied, but the college contends that it is a privately owned and operated religious institution and that its decision may not be inquired into or changed by any dis-

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1. The First Amendment to the Constitution of the United States expressly provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, etc."

2. 42 U.S.C.A. § 2000e-1 provides: "Subchapter not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, associations, educational institutions, or societies. This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

agreement with such conclusions; and least of all that the petitioner simply has no statutory authority to issue a subpoena and to require conformity thereto under any guise or pretext. Ninety-six percent of the full time members of the college faculty are Baptists. Eighty-eight percent of the students are Baptists. Two courses in Bible and chapel meetings twice a week are required of all students. There is no female minister in any Baptist church in the entire Mississippi Baptist Convention. Mississippi College did not hire a woman to teach Bible courses. Those overriding convictions may or not find universal support among the Baptist faith but this petitioner is not given any power or any authority even to seek evidence to establish such facts in seeking to determine whether or not it has jurisdiction of this case. Extensive evidence was taken by the Court Reporter and is before the Court and has been examined and considered, and this Court is of the opinion that the petitioner does not have jurisdiction even to maintain its investigation. This is by no means controlled, or even influenced by the decision of *New Orleans Public Service, Inc. v. William H. Brown, III,* (5 CA) 507 F.2d 160 dealing with an employer who was clearly covered by and amenable to the act.

The State of Rhode Island has adopted a statute under which the state paid directly to teachers in non-public elementary schools a supplement of 15% of their annual salary. Under the state statute, the records of the religious schools had to be examined in order to assess how much of the expenditures were attributable to secular education and how much to religious activity.[3]

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3. *Alton J. Lemon et al. v. David H. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 2115 where the Court said: "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the

(Continued on following page)

In another pertinent case involving the National Labor Relations Board and certain Catholic Parochial Schools in which the board sought to establish a collective bargaining relationship between the teachers and the school. The Court said that the First Amendment had interposed itself to prevent such relationship. The board sought to engage in factual inquiry into such matters which would necessarily raise First Amendment problems. The board attempting to assess the degree of religious activity involved in a particular decision would necessarily involve itself in setting the religious standards for the institution. The United States Court of Appeals for the Seventh Circuit declined to grant the board such authority.[4]

This Circuit has held that the First Amendment to the Constitution precluded this petitioner from investigating charges of sex discrimination as a religious institution.[5]

Footnote continued—
Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted 'the hazards of government supporting churches' in Walz v. Tax Commission, supra 397 U.S., at 675, 90 S.Ct., at 1414, and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses."

4. *The Catholic Bishop of Chicago v. The National Labor Relations Board,* (7 CA) 559 F.2d 1112, 1125 the Court said: "We are unable to see how the Board can avoid becoming entangled in doctrinal matters if, for example, an unfair labor practice charge followed the dismissal of a teacher either for teaching a doctrine that has current favor with the public at large but is totally at odds with the tenets of the Roman Catholic faith, or for adopting a lifestyle acceptable to some, but contrary to Catholic moral teachings. The Board in processing an unfair labor practice charge would necessarily have to concern itself with whether the real cause for discharge was that stated or whether this was merely a pretextual reason given to cover a discharge actually directed at union activity. The scope of this examination would necessarily include the validity as a part of church doctrine of the reason given for the discharge."

5. *Mrs. Billie B. McClure v. The Salvation Army,* (5CA) 460 F.2d 553, 558, 559, 560 where the Court said: "The relation-

(Continued on following page)

Consequently, this Court is of the opinion that the Equal Employment Opportunity Commission has no power or no authority to seek or require that which it undertakes from the respondent. The subpoena heretofore issued in this case will be nullified. The efforts of the petitioner have been in vain and no relief will be granted.

This is a novel question which is comparatively new in this district and no recovery in any amount will be authorized or allowed as attorney's fees.

The respondent's attorney may prepare a judgment accordingly and may prepare an accompanying Findings of Fact and Conclusions of Law to support the judgment. There will be no taxation of costs in this case.

/s/ HAROLD COX
United States District Judge

May 5, 1978

Footnote continued—
ship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection."

* * * "We find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."

APPENDIX D

(Filed May 17, 1978)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J78-0113(C)

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,
Plaintiff,

v.

MISSISSIPPI COLLEGE,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the Court on the Equal Employment Opportunity Commission's (hereinafter the EEOC) application for a show cause order to enforce its subpoena, the Court having heard arguments of counsel and studied their briefs and having rendered an opinion herein makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1.

Patricia Summers, the charging party, filed a charge with the EEOC on May 5, 1976, alleging that Mississippi

College, the respondent, had discriminated against her on the basis of sex by denying her a full time teaching position. On January 20, 1977, the EEOC served upon Mississippi College a subpoena duces tecum for voluminous statistical and documentary information, including a work force breakout of all its faculty and administration, sources of recruitment, pay studies, lists of promotions, personnel records, and applications.

2.

Mississippi College petitioned the EEOC to revoke and/or modify the subpoena. The EEOC denied this petition and reissued the subpoena on October 3, 1977, with the return date of October 20, 1977. On October 17, 1977, the college's attorney informed the EEOC that the respondent would not comply with the subpoena except as may be necessary to determine the agency's jurisdiction.

3.

On March 17, 1978, the EEOC filed a petition for an order compelling the college to show cause why the subpoena should not be enforced. This Court granted the show cause order the same day and a hearing was held before this Court on May 3, 1978. This Court issued its opinion denying enforcement of the subpoena on May 5, 1978.

4.

Mississippi College has a written policy of preferring applicants of the Baptist Faith except when it becomes necessary in a particular instance to hire a non-Baptist in order to maintain academic standards in a given discipline. It is undisputed that the male who was hired for the position in question is a Baptist while the charging party is Presbyterian.

5.

Mississippi College is completely owned, controlled and operated by the Mississippi Baptist Convention. The Mississippi Baptist Convention is composed of Southern Baptist churches in the State of Mississippi. Mississippi College is governed by a Board of Trustees elected by the Mississippi Baptist Convention. To be eligible for membership on the Board of Trustees, a person must be a member of a church which belongs to the Mississippi Baptist Convention. The Mississippi Baptist Convention does maintain control over Mississippi College. For example, Section 3 of Article IX of the Convention Constitution provides that the Education Commission of the Convention must approve any major deparature from the established program of any educational institution owned and controlled by the Convention.

6.

Religion is an integral part and purpose of the educational process at Mississippi College. *The Baptist Faith and Message,* which is a concise statement of the convictions and faith of the Southern Baptist Convention and the Mississippi Baptist Convention, establishes in paragraph 12 that education is an integral part of the Christian mission of the Church. *Reaffirmations,* the statement adopted by the Association of Southern Baptist Colleges and Schools and by the Mississippi Baptist Convention, clearly reaffirm the religious purpose and the Christian mission of Mississippi College. The degree of religiosity in the manner in which secular subjects are taught was articulated by Dr. Lewis Nobles, the President of Mississippi College. In an address which Dr. Nobles delivered to the student body in September of 1977, and which was reprinted in the *Beacon,* the College Alumni magazine, Dr. Nobles said the following:

The basic principles upon which this institution stands are old. They were proclaimed clearly 2,000 years ago, but they are much older than that - they are eternal! This aspect of Mississippi College is unchanging and is the basic reason that the Baptist of our state have operated it as a part of their mission program for 126 years.

* * *

We may study the history, sociology, economics, languages, arts, anatomy, and psychology of man - to mention only a few disciplines - but man is worth studying only because he is specifically related to God. We believe there is a divine stamp on personal integrity, morality and responsibility upon respect, compassion, and concern for all our fellow men, upon justice, courage and freedom but we regard the basic truths of the Christian faith as immutable.

* * *

Basically [the college's] rules are designed to express the Christian college's belief that the undisciplined life is self-destructive and intrusive upon the rights of others.

* * *

We know that there are many in our world who do not believe in our God, in his special concern for man, in man's unique nature or in God's will and the purpose for man. Aspects of these questions may quite properly be discussed at Mississippi College - on campus and in the classroom - but Mississippi College was established and still operates on the basis that these are not open questions, but rather eternal and unchanging truths and the college shall not cease from proclaiming them.

Further, the handbook for faculty and staff members clearly advises faculty members that religion is an integral part of secular education. The handbook states that:

> In Christian education, there should be a proper balance between academic freedom and academic responsibility . . . The freedom of a teacher in a Christian school, college, or seminary is limited by the preeminence of Jesus Christ, by the authoritative nature of the scriptures, and by the distinct purpose for which the school exists . . . We reaffirm our commitment to the Biblical and theological basis for Christian higher education . . . We affirm our responsibility for influencing the development of Christian character in students who attend our schools.

7.

The EEOC's assertion of jurisdiction over Mississippi College would involve the EEOC in the personnel practices of the college in the following ways: (1) furnishing extensive documents, records and information relating to the religious and employment practices of the school; (2) questioning the religious beliefs of the college and the Convention; (3) determining the respective and comparative qualifications of teachers; (4) analyzing the work force regarding race, sex, religion; (5) determining which departments and positions are unlawfully segregated on the basis of sex and race as opposed to religious reasons; (6) interrogating faculty and administrators about decisions involving hiring, promotions, firing and discipline of faculty members and the extent to which religion was a factor in such decisions; (7) determining in certain cases the sincerity of the religious beliefs espoused by the College and the Mississippi Baptist Convention; (8) investigating and determining the college's motive in certain employment decisions, i.e. whether the college was motivated for religious

reasons or unlawful discriminatory reasons; (9) substituting its own judgment for that of the college and the Mississippi Baptist Convention on which religious issues are of real significance for employment purposes.

Moreover, among common remedies for violations of Title VII employed by the Equal Employment Opportunity Commission are the following:

1. Reform, recruitment, and hiring practices - To remedy an imbalance in the work force, the EEOC often insists upon the reform of recruitment and hiring practices to produce a more integrated result.

2. Desegregate sexes in all job classifications - Where job classifications tend to be sex segregated, the EEOC insists on the remedy of desegregating job classifications by affirmative action.

3. Elimination of certain job barriers - Employment considerations based upon arrest and conviction records, bad credit ratings, marital status, etc. are frequently required to be eliminated because of the impact upon a protected class.

4. Form of application and interviewing process - In interviewing applicants, the EEOC has frequently taken the position that some personal inquiries should not be asked since they have an inhibiting effect upon applicants.

5. Promotion and hiring on the basis of quotas - Frequently, in order to increase minority and sex representation, the EEOC will insist on quotas in order to have the faculty more representative of the minority community.

6. Monitoring and reporting - The EEOC can require under the statute reports to be filed with the Com-

mission, as well as access to the premises to monitor the hiring and employment practices of the College.

(See EEOC Compliance Manual.)

8.

Mississippi College employs the following personnel practices among others: (1) recruitment of faculty from very limited and religious sources; (2) exclusion of women from teaching religion even though academically competent to do so; (3) discrimination against unwed mothers; (4) adverse consideration an applicant's arrest or conviction record; (5) adverse consideration of an applicant's excessive garnishments and poor credit ratings; and (6) consideration of divorce as grounds for refusal to hire. These policies are based upon religious and moral convictions. It is also noted that the view of the Mississippi Baptist Convention with respect to the role of women is, in part, shown by the fact that there is not an ordained female minister in the entire Mississippi Baptist Convention. This practice is believed by the Convention to have its support in the Bible.

9.

Not only is the religious character of the school evident from its written policies, but also in the academic curriculum and in student activities. Religious courses are mandatory for undergraduate students. The 1978-79 General Catalog of Mississippi College lists the numerous courses taught in the division of religion. It is also evident from the catalog that other religious courses permeate the entire curriculum of the college and extend into the various academic disciplines. Attendance at chapel services are required for all students twice per week. Prayer is frequently conducted in the classrooms. Voluntary stu-

dent prayer meetings are encouraged and held. The college provides prayer rooms for its students and employs a full time Director of Christian Activities whose salary is paid by the Mississippi Baptist Convention and Mississippi College. The college is frequently the site of statewide Baptist meetings and the students are encouraged to and do participate on an organized basis in church activities throughout the State carrying forth from the school the church's evangelical mission. Approximately 88% of the students are Baptist.

10.

On the basis of the foregoing, I find that Mississippi College is a religious educational institution and is an integral part of the Christian mission of the Mississippi Baptist Convention. Its purpose is to provide a liberal education permeated and guided by the Christian ideals of the Mississippi Baptist Convention.

11.

It is further clear that the hiring and employment of faculty and staff members is part of the college's religious mission. The faculty and staff handbook quoting from the Reaffirmation adopted by the Association of Southern Baptist Colleges states that "we reaffirm our commitment to seek and employ the highest type of Christian teacher." The handbook further provides that:

> Mississippi College treats religion as an important factor in the consideration of prospective faculty and staff members for the following reasons: . . . 5. the teaching of classes at the college can best be carried out in accordance with the purpose of the college by persons intimately familiar with the principles of Southern Baptists, since the college's purpose is to have

> all classes taught in the context of, and subject to the text, of religious principles . . . In filling vacancies, consideration is given to member of evangelical Christian denominations, with the understanding that first preference will be given in each case to active members of Baptist churches, provided that academic and professional standards are met.

In addition to inquiring into an applicant's religious affiliation, the college also inquires into the drinking and smoking habits and marital status of applicants. This inquiry is made according to the faculty handbook because "Mississippi College seeks faculty and administrative personnel who are committed Christians and whose Christian principles are exemplified in daily living." The policy of preferring Baptists is evident in the number of Baptist employees. Approximately 97% of the full time faculty are Baptist.

CONCLUSIONS OF LAW

1.

Mississippi College is an employer as defined by § 701 of the 1964 Civil Rights Act as amended, 42 U.S.C. § 2000e.

2.

The Southern Baptist Convention and the Mississippi Baptist Convention are religious associations as that term is used in § 702 of the 1964 Civil Rights Act as amended, 42 U.S.C. § 2000e-1.

3.

Mississippi College is an educational institution as that term is used in § 702 of the 1964 Civil Rights Act as amended, 42 U.S.C. § 2000e-1.

4.

The exemption contained in § 702 allows a religious educational institution to discriminate on the basis of religion. If in the course of an EEOC investigation based on a charge alleging discrimination on the basis of race, color, sex or national origin, a religious educational institution alleges that it hired or did not hire a person of a particular religion, then the EEOC has no jurisdiction in the case other than to investigate whether in fact a person of a particular religion was in fact hired. The EEOC may not further investigate to determine whether religion is actually a pretext. Such an investigation would necessarily involve the subjective evaluation by the EEOC of the religious preferences of the respondent and such government inquiry and assessment are forbidden by the First Amendment. The EEOC must defer to the statutory exemption which allows preferences based on religion.

5.

Aside from § 702 of Title VII, the assertion of jurisdiction of the Equal Employment Opportunity Commission over Mississippi College would potentially violate the First Amendment of the United States Constitution for the reasons stated by the Supreme Court in *Lemon v. Kurtzman*:

> This kind of state inspection and evaluation of the religious content of a religious organization is fraught with a sort of entanglement that the constitution forbids. It is a relationship pregnant with the dangers of excessive government direction of church, schools and hence churches . . . we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the religion clauses.

403 U.S. 602, 620, 91 S. Ct. 2105, ..., 29 L.Ed.2d 745, 760 (1971). Accordingly, this Court concludes as a matter of law that the establishment clause of the First Amendment to the United States Constitution renders the application of Title VII unconstitutional as to a religious educational institution such as Mississippi College.

6.

This Court also concludes as a matter of law that the assertion of the Equal Employment Opportunity's investigatory powers and remedial powers over a religious educational institution such as Mississippi College is unconstitutional because it represents a potential independent violation of the Free Exercise Clause of the First Amendment to the United States Constitution. Even if the Commission only conducted a surface investigation, the mere possibility of an EEOC investigation inhibits the college from preferring Baptist faculty members in instances subject to the Commission's scrutiny. As the Seventh Circuit observed:

> The Board's order to bargain unquestionably in our opinion inhibits the bishop's authority to maintain parochial schools in accordance with ecclesiastical concerns . . . The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishop's control of the religious mission of the schools. To minimize friction between the church and the Board, prudence will ultimately dictate that the bishop tailor his conduct in decisions to steer far wider of the unlawful zone of impermissible conduct.

Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1123-24 (7th Cir. 1977) *cert. granted* No. 77-752, 45 U.S.L.W. 3512 (Feb. 21, 1978).

7.

This Court concludes as a matter of law that the school's selection of faculty and staff members is in significant part based on religious or ecclesiastical factors and therefore this Court concludes as a matter of law that the Free Exercise Clause of the First Amendment precludes the EEOC from investigating the charges of sex discrimination under the facts of this case. Since the college's selection of faculty and staff members touches upon, in significant part, church administration, this relationship must be recognized as an ecclesiastical matter. *McClure v. The Salvation Army,* (5CA) 460 F.2d 553, Cert. denied 93 S.Ct. 132, rehearing denied 93 S.Ct. 513.

8.

Based on the foregoing, I conclude that the assertion of jurisdiction of the Equal Employment Opportunity Commission over Mississippi College to further process the instant charge would violate the First Amendment rights of Mississippi College and the enforcement of the subpoena is therefore denied.

This the 16th day of May, 1978.

/s/ Harold Cox
United States District Judge

APPENDIX E

(Filed May 17, 1978)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J78-0113(C)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

MISSISSIPPI COLLEGE,
Defendant.

ORDER AND JUDGMENT

This cause having come before the Court on the Petition of the Equal Employment Opportunity Commission for an Order of this Court enforcing its subpoena against Defendant, Mississippi College, and a hearing having been held before this Court on May 3, 1978; and this Court having heard the testimony of Dr. Lewis Nobles, President of Defendant College, having received numerous exhibits into evidence, having heard oral arguments of counsel and having received and studied counsel's briefs; and this Court having issued its opinion and having entered its Findings of Fact and Conclusions of Law holding that the subpoena should not be enforced for the reasons therein stated, it is

ORDERED, and ADJUDGED

That the Petition for enforcement of subpoena be and the same is hereby denied.

ORDERED, 16th day of May, 1978.

/s/ Harold Cox
United States District Judge

APPENDIX F

(Filed November 12, 1980)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3123

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

versus

MISSISSIPPI COLLEGE,
Defendant-Appellee.

Appeal from the United States Court for the
Southern District of Mississippi
Before MORGAN, CHARLES CLARK and TATE,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed by the appellant and appellee in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Charles Clark
United States Circuit Judge

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-653

MISSISSIPPI COLLEGE,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 11, 1981.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 28 day of January, 1981.

APPENDIX H

U.S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX I

Relevant Portions of the Civil Rights Act of 1964

78 Stat. 241, 253-266 (1964), as amended by 86 Stat. 103 (1972), 42 U.S.C. §2000e-2000e-15

TITLE VII-EQUAL EMPLOYMENT OPPORTUNITY

DEFINITIONS

§701. For the purposes of this title—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has [twenty-five] fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, [or a State or political subdivision thereof,] or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954.

* * *

(f) The term "employee" means an individual employed by an employer[.], except that the term 'employee'

shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff or an appointee on the policy making level or an immediate advisor in respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

* * *

(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

EXEMPTION

§702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its [religious] activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

§703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular re-

ligious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

* * *

§706(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.

* * *

INVESTIGATIONS, INSPECTIONS, RECORDS, STATE AGENCIES

§709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

* * *

INVESTIGATORY POWERS

§710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply.

* * *

[NOTE: SECTION 11 OF THE NATIONAL LABOR RELATIONS ACT, REFERRED TO IN THE PRECEDING PARAGRAPH IS REPRINTED BELOW.]

INVESTIGATORY POWERS

§11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appeal before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

[(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.]

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting

forth the manner of such service shall be proof of the same; and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

No. 80-1703

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ALEXANDER L.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

MISSISSIPPI COLLEGE, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals failed to consider the affirmative intent of Congress when it held that the language and legislative history of Title VII of the Civil Rights Act of 1964 compel the conclusion that Congress intended Title VII to apply to employers that are religiously affiliated institutions of higher learning.

2. Whether enforcement of an Equal Employment Opportunity Commission subpoena requesting employment records from a religiously affiliated institution of higher learning involves the government in excessive entanglement with religion or impermissibly inhibits the free exercise of religion.

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BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 626 F. 2d 477. The opinion of the district court (Pet. App. A30-A34) is reported at 451 F. Supp. 564. The findings of fact and conclusions of law entered by the district court (Pet. App. A35-A46) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1980 (Pet. App. A30). Petitions for rehearing were denied on November 12, 1980 (Pet. App. A48). On January 28, 1981, Justice Powell extended the time in which to file a petition for a writ of certiorari to and including April 11, 1981 (Pet. App. A49). The petition for a writ of certiorari was filed on April 11, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This subpoena enforcement action was brought in the United States District Court for the Southern District of Mississippi by the Equal Employment Opportunity Commission to enforce a subpoena issued by the Commission under Section 710 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-9. The subpoena was issued in aid of the Commission's investigation of a charge of discrimination filed by Dr. Patricia Summers, a former part-time faculty member at Mississippi College, an educational institution affiliated with the Mississippi Baptist Convention (Pet. App. A5). Summers alleged that the college had denied her a full-time faculty position because of her sex, and that the college had discriminated against women as a class in recruitment, promotion, and salary, as well as by maintaining segregated job classifications (*id.* at A7). She also alleged that the college had discriminated on the basis of race in recruiting and hiring (*ibid.*).

The Commission's subpoena sought the following information: (1) a list of members of the college faculty and administration, showing the race, sex, religion, job classification, and pay of each of them; (2) sources from which the college recruited faculty members; (3) any studies of faculty pay for the 1975-1976 school year; (4) all promotions of members of the faculty or administration for the 1975-1976 and 1976-1977 school years; (5) Summers' employment records and the employment records of William Bailey, the man who was awarded the full-time position for which she had applied; (6) all employment applications for the years 1975-1976 and 1976-1977; and (7) the most recent EEOC-6 report filed by the college (Pet. App. A8-A9 & n.3).

Based on Section 702 of Title VII, 42 U.S.C. 2000e-1,[1] the district court denied enforcement of the subpoena, holding that Title VII "has no application to a female in the employ of Mississippi College" (Pet. App. A31). In its findings of fact and conclusions of law, the court found that "Mississippi College is a religious educational institution and is an integral part of the Christian mission of the Mississippi Baptist Convention" (*id.* at A42). The court held that the Commission's assertion of jurisdiction over Mississippi College would potentially violate the Establishment Clause of the First Amendment because of the danger of entanglement of the government in religious affairs (*id.* at A44). Noting that the college has a policy of preferring Baptists for faculty positions, the district court also held that "the mere possibility of an EEOC investigation" would violate the Free Exercise Clause by inhibiting the college from following this policy "in instances subject to the Commission's scrutiny" (*id.* at A45).

The court of appeals reversed. First, the court held that the Commission has jurisdiction over charges of race and sex discrimination brought against religious organizations. The court held (Pet. App. A18; citation omitted):

> "The language and the legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment."

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[1]Section 702 of Title VII, 42 U.S.C. 2000e-1, provides that, "This subchapter shall not apply * * * to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

The court of appeals also held that the application of Title VII to the employment practices of the college would not foster excessive government entanglement with religion[2] because of the "limited nature of the resulting relationship between the federal government and the College" (Pet. App. A25). The court noted (*ibid.*):

> Employment practices based upon religious discrimination are exempt under § 702 from the coverage of Title VII and the College could not be required to alter any of its other employment practices until it exercised its opportunity to justify those practices on first amendment grounds before a federal district court. Because no religious tenets advocated by the College or the Mississippi Baptist Convention involve discrimination on the basis of race or sex, an investigation by the EEOC will only minimally intrude upon any of the College's or Convention's religious beliefs. No ongoing interference with the College's religious practices will result from an EEOC investigation of the charge filed by Summers. Therefore, we conclude that imposing the requirements of Title VII upon the College does not violate the establishment clause of the first amendment.

The court of appeals further held that enforcement of the Commission's subpoena would not impermissibly inhibit the free exercise of religion. Given the exemption for religion-based discrimination by religious organizations contained in Section 702 of Title VII, 42 U.S.C. 2000e-1, the court held (Pet. App. A26) that Title VII would generally have a "minimal" impact on the college's exercise of its

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[2]As the court of appeals noted (Pet. App. A22), there is no question that Title VII has a secular purpose and does not have the primary effect of either advancing or inhibiting religion. See *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). Thus, the only issue presented below was whether the application of Title VII in these circumstances fosters excessive government entanglement with religion.

sincerely held religious beliefs. In addition, the court held that the government's "compelling interest in eradicating discrimination is sufficient to justify the minimal burden imposed upon the College's free exercise of religious beliefs that results from the application of Title VII" (*id.* at A27).

The court of appeals remanded the case to the district court for further proceedings,[3] including a determination as to which portions of the Commission's subpoena should be enforced.

ARGUMENT

1. Petitioner contends (Pet. 12-15) that the decision below is inconsistent with *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979), in which the Court held that absent a showing of the "affirmative intention of the Congress clearly expressed," it would not construe the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, to cover employees of religious secondary schools, where a preliminary inquiry showed that the exercise of such jurisdiction would present serious First Amendment problems. Thus, the Court declined to rule on the constitutionality of the Act as applied to such religious schools.

The court below properly reached the constitutional question here because "[t]he employment relationship between Mississippi College and its faculty and staff is one intended by Congress to be regulated by Title VII" (Pet. App. A19-A20).[4] In reaching this conclusion, the court of

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[3]The court of appeals held (Pet. App. A20-A21) that the district court should determine (among other things not relevant here) whether the college's decision not to consider Summers for the full-time vacancy was based upon her religion and therefore exempt under Section 702 of Title VII.

[4]Although the clear expression of congressional intent that religious employers would be covered by Title VII is sufficient to distinguish *Catholic Bishop*, the constitutional problems potentially raised with respect to the application of Title VII to such employers are also

appeals relied upon its prior decision in *McClure* v. *Salvation Army,* 460 F. 2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972), in which the court considered a constitutional challenge to the application of Title VII to religious organizations. After thoroughly examining the language and legislative history of Title VII, the Fifth Circuit concluded in *McClure* that (460 F. 2d at 558):

> The language and legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.

Moreover, the holding of the court below is consistent with the those of every court to have considered the application to religious organizations of Title VII's prohibition of discrimination on the basis of race, color, sex or national origin. *McClure* v. *Salvation Army, supra,* 460 F. 2d at 558; *Dolter* v. *Wahlert High School,* 483 F. Supp. 266, 268-269 (N.D. Iowa 1980); *Ritter* v. *Mount St. Mary's College,* 23 F.E.P. Cas. 734, 736 (D. Md. 1980); *EEOC* v. *Pacific Press Publishing Association,* 482 F. Supp. 1291, 1302-1306 (N.D. Cal. 1979) (appeal docketed Apr. 23, 1980); *National Organization for Women* v. *President and Board of Trustees of Santa Clara College,* 16 F.E.P. Cas. 1152, 1156 (N.D. Cal. 1975). See also *Whitney* v. *Greater New York Corporation of Seventh-Day Adventists,* 401 F. Supp. 1363, 1368 (S.D.N.Y. 1975).

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considerably less serious than those posed by application of the National Labor Relations Act. As the court of appeals held (Pet. App. A19), and as we discuss below (see page 10, *infra*), the non-adjudicatory nature of Commission proceedings and the exemption provided by Section 702 for discrimination by religious employers on the basis of religion both minimize the potential for any conflict with the First Amendment.

In reaching the conclusion that Congress intended to prohibit religious organizations from discriminating in employment on the basis of race, sex or national origin, the courts have noted that unlike the National Labor Relations Act, which is silent with respect to the coverage of religious organizations, Section 702 of Title VII explicitly provides a limited exemption for religious employers from the prohibition of religion-based discrimination contained in Title VII. *Dolter* v. *Wahlert High School, supra,* 483 F. Supp. at 268-269; *Ritter* v. *Mount St. Mary's College, supra,* 23 F.E.P. Cases at 736-737; *EEOC* v. *Pacific Press Publishing Association, supra,* 482 F. Supp. at 1303. In providing this limited exemption, Congress clearly and unequivocally demonstrated its intent that religious employers should otherwise be covered by Title VII.

Congress' intent is also well evidenced by the legislative history of the statute. During consideration of Title VII in 1964, and of the Equal Employment Opportunity Act in 1972, Congress considered and rejected proposals which would have completely excluded religious employers from coverage under Title VII.[5] See *EEOC* v. *Pacific Press Publishing Association, supra,* 482 F. Supp. at 1301-1307 (detailed analysis of legislative history of Title VII coverage of religious employers). Furthermore, the section-by-section analysis of the 1972 amendments provides the clearest possible statement of affirmative congressional intent that religious organizations should be covered by Title VII (118 Cong. Rec. 7167 (1972); emphasis added):

> The limited exemption from coverage in this section for religious corporations, associations, educational institutions or societies has been broadened to allow

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[5]H.R. Rep. No. 914, 88th Cong., 1st Sess. 10 (1963); Clark-Case substitute bill, amendment No. 871, 110 Cong. Rec. 12864 (1964); Ervin-Allen amendment No. 815, 118 Cong. Rec. 1981-1982 (1972).

> such entities to employ individuals of a particular religion in all their activities instead of the present limitation to religious activities. *Such organizations remain subject to the provisions of Title VII with regard to race, color, sex or national origin.*

The plain language of Section 702, together with the explicit confirmation of congressional intent contained in the legislative history, conclusively show the affirmative intent of Congress, clearly expressed, that Title VII apply to religious employers. The application to Mississippi College of Title VII's prohibition of race and sex discrimination in employment is therefore not inconsistent with this Court's decision in *Catholic Bishop.*

2. Petitioner also contends (Pet. 8-10) that application of Title VII to Mississippi College would cause an excessive government entanglement with religion and is therefore prohibited by the First Amendment under this Court's decision in *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971). In *Lemon,* the Court identified three factors to be considered in determining whether government entanglement with religion is excessive: the character and purposes of the institution that are affected; the nature of the aid to or burden upon the institution; and the resulting relationship between the government and the religious authority (403 U.S. at 614-615). See also *Roemer* v. *Board of Public Works of Maryland,* 426 U.S. 736, 761-765 (1976). Certain contacts between church and state are inevitable, of course, and the question whether entanglement is "excessive" is one of degree. See *Lemon* v. *Kurtzman, supra,* 403 U.S. at 614; *Walz* v. *Tax Commission,* 397 U.S. 664, 674 (1970). In the present case, the contact between church and state arises because of a national policy of promoting equal employment opportunity, a policy that also rests on a constitutional footing.

The court of appeals properly considered each of the factors identified in *Lemon* (Pet. App. A22-A25).[6] Although the court of appeals accepted the district court's characterization of Mississippi College as a "pervasively sectarian institution," the court also found that the enforcement of the Commission's subpoena and the general application of Title VII to the employment practices of the college would impose a minimal burden on its religious practices (Pet. App. A23-A24). Furthermore, the court found that the relationship between the federal government and the college that would result from the application of Title VII would be limited in nature (*ibid.*).

In reaching these conclusions, the court noted that the information sought in the Commission's subpoena did not directly implicate any religious practice of the college. While recognizing that enforcement of the subpoena might lead to further investigation or to an enforcement action, the court held that the safeguards provided in Title VII—the exemption for religion-based discrimination contained in Section 702 of Title VII and the college's right to a *de novo* hearing in federal court before any adjudication of a Title VII violation could occur—minimize the potential impact of Title VII enforcement on the college's religious practices and limit the scope and effect of the ensuing relationship between the federal government and the college (Pet. App. A23-A24). Thus, the government involvement

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[6]The court of appeals analyzed this case in terms of both the Establishment Clause (see Pet. App. A22-A25) and the Free Exercise Clause (see *id.* at A25-A27). Although we agree with the conclusion of the court of appeals that enforcement of the Commission's subpoena would violate neither of the religion clauses, we do not believe that petitioner's claim should properly be viewed as raising any issue under the Establishment Clause in any event because the government action at issue here neither establishes a religion nor takes a step that could lead to such establishment. See *Lemon* v. *Kurtzman, supra*, 403 U.S. at 612; *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962).

here was seen to fall far short of that "comprehensive, discriminating and continuing state surveillance" (*Lemon* v. *Kurtzman, supra,* 403 U.S. at 619) prohibited by the First Amendment.

Petitioner's contention that application of Title VII here would foster excessive government entanglement with religion is unfounded because it is based upon certain misconceptions concerning the operation of Title VII. By ignoring the limitations on the scope of Title VII as applied to religious employers, as well as the limitations placed on the authority of the Commission to enforce the statute, petitioner paints a distorted picture of the potential effect of the application of Title VII to the college's employment practices. At bottom, petitioner's argument is premised on the erroneous assumption (Pet. 8-9) that the Commission could assess the validity of the college's religious beliefs and order the college to adopt employment practices that conflict with those beliefs.

As the court of appeals recognized, however, the Commission's authority under Title VII is much more limited. Title VII does not subject religious employers to ongoing, comprehensive monitoring of the religious content of their practices. The Commission begins an investigation only after a charge of discrimination has been filed by an aggrieved person or by a Commissioner. Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b). The initial inquiry into whether a religious employer discriminates on the basis of race, sex or national origin involves no religious question. Only if an employer asserts a religious reason as a defense does this issue arise at all. Even then, the employer would have a full opportunity to present in a federal court any defenses it may have—including defenses based on the First Amendment—before it could be required to alter its employment practices. The Commission has no independent enforcement power.

3. Petitioner's contention (Pet. 10-12) that application of Title VII would unreasonably burden the college's right to free exercise of religion is also based on a misunderstanding of the operation of Title VII. Thus, petitioner argues (Pet. 11) that "[m]odifying the College's employment policies to comport with Title VII would mean that religious considerations could no longer be a prime area of inquiry and consideration in the College's employment policies." This contention is wholly unfounded, as the court of appeals correctly held (Pet. App. A26). With respect to a religious employer, Title VII prohibits only those employment practices that constitute discrimination on the basis of race, color, sex or national origin. Because the college does not contend that any of its religious beliefs require discrimination on the basis of race, color, sex or national origin, there is no inherent conflict between Title VII and the college's free exercise of its religious beliefs.

Petitioner suggests, however, that the threat of a Title VII investigation will inhibit the college from freely choosing applicants for employment on the basis of religious considerations. Although the Commission's investigation of charges of race and sex discrimination may require that officials of religious organizations explain allegedly discriminatory actions, there is no reason to believe that the necessity for articulating the reasons for a challenged action will have a chilling effect, any more than the necessity for articulating valid business reasons will chill the actions of any other employer. It must be emphasized that even if a prima facie case of employment discrimination is established on the basis of a particular employment decision, an employer will not be liable under Title VII if he can articulate some legitimate, nonpretextual, nondiscriminatory reason for the action. See *Texas Department of Community Affairs* v. *Burdine*, No. 79-1764 (Mar. 4, 1981), slip op. 4-7. In the case of a religious employer, a showing that a particular

employment decision was made on the basis of an individual's religion, rather than race, sex, or national origin, would constitute such a defense. Similarly, Title VII's prohibition against facially neutral employment practices which have a disparate impact based on race, color, sex, or national origin, does not apply to practices that are justified by business necessity. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). An employer like Mississippi College, whose business is "to provide a liberal education permeated and guided by the Christian ideals of the Mississipi Baptist Convention" (Pet. App. A42), may maintain employment standards necessary to the accomplishment of that purpose, even if such standards have a disparate impact. Finally, Title VII permits discrimination on the basis of religion, sex, or national origin where they are bona fide occupational qualifications. See Section 703(e) of Title VII, 42 U.S.C. 2000e-2(e). Thus, if religious considerations precluded the employment of a woman to teach religion at a Baptist college (as the college claims), this practice may be defended as a bona fide occupational qualification.

When the provisions of Title VII are properly understood, it is clear that the court of appeals' holding that the application of the statute to petitioner will not significantly burden the college's free exercise of its religious beliefs is fully consistent with the principles established by this Court.

Finally, the court of appeals correctly held (Pet. App. A27) that the government's compelling interest in eradicating discrimination[7] "is sufficient to justify the minimal burden imposed upon the College's free exercise of religious beliefs that results from the application of Title VII." This holding is fully consistent with the principle enunicated by

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[7]See, *e.g.*, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).

this Court that the government may impose reasonable restrictions on religiously based conduct where justified by a compelling governmental interest. *Wisconsin* v. *Yoder*, 406 U.S. 205, 219-220 (1972); *Sherbert* v. *Verner*, 374 U.S. 398, 403 (1963).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LEROY D. CLARK
General Counsel
Equal Employment Opportunity Commission

JUNE 1981

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